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IN THE

Supreme Court of the United States

October Term, 1958

No. 392

VINCENZO COSCIA,

Petitioner,

against

JOHN A. WILLARD, as Deputy Commissioner of the United States Department of Labor Bureau of Employees' Compensation, Second Compensation District, and UNIVERSAL TERMINAL AND STEVEDORING CORPORATION and THE TRAVELERS INSURANCE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDIX

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On the Petition.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Vincenzo Coscia prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 30, 1958.

Opinions of the Courts Below

By Findings of Fact and Decision dated July 6, 1955, John A. Willard, Deputy Commissioner of the United States Department of Labor, Bureau of Employees' Compensation, Second Compensation District, In the Matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act by the petitioner,

rejected the claim for compensation. This decision was not officially reported and appears on page 10a of the appendix to this petition. On petitioner's appeal to the United States District Court for the Eastern District of New York, Hon. Robert A. Inch, Chief Judge, by Memorandum of Decision dated July 22, 1957 and Order dated October 7, 1957, found that said compensation order rejecting the claim was not in accordance with the law and therefor denied the motion for summary judgment by respondent, John A. Willard, and granted petitioner's motion for summary judgment to the extent of setting aside the compensation order and remanding the matter to the respondent John A. Willard for further proceedings in accordance with law. This decision was not officially reported and appears on page 7a of the appendix to this petition. On respondents-appellants' appeal to the Court of Appeals for the Second Circuit the judgment of the District Court was reversed and the case remanded with directions to dismiss the complaint. A Petition for Rehearing was denied. The opinion of the Court of Appeals, dated June 30, 1958, and the denial of the petition for rehearing, dated August 8, 1958, have as of the date of this printing not been officially published, and are reprinted at pages 1a and 14a of the appendix to this petition.

Jurisdiction

Judgment was entered in the Court of Appeals for the Second Circuit on June 30, 1958, and the timely petition for rehearing was denied on August 8, 1958.

Jurisdiction to review the judgment by writ of certiorari is found in 28 U. S. C. section 1254 (1) and 2101 (c) as well as in Rule 19 (b) of the rules of this Court under this Court's power of supervision over the Federal Judicial System, and more particularly on the grounds that the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decisions of this Court and of

other Courts of Appeals, and has so far departed from the accepted and usual course of judicial proceeding and has so far sanctioned such a departure by the deputy commissioner, as to call for an exercise of this Court's power of supervision.

Statute Involved

The statutory provisions involved are in the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. 902, paragraphs 2 and 10, 33 U. S. C. 903, paragraph (A), 33 U. S. C. 920, paragraph (a) and 33 U. S. C. 921, paragraph (b), pertinent portions of which are reprinted hereinafter:

33 U. S. C. 902 (2)

Section 902, Par. 2:

> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U. S. C. 902 (10)

Section 902, Par. 10:

> "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

33 U. S. C. 903 (A)

Section 903, Par. A:

> Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable

waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

33 U. S. C. 920 (a)

Section 920, Par. (a):

Presumptions. In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this chapter.

33 U. S. C. 921 (b)

Section 921, Par. (b):

Review of compensation orders.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred * * *

Questions Presented

1. Should the humanitarian purpose of the Longshoremen's and Harbor Workers' Compensation Act be subverted by a strict adherence to so-called "integrity of the administrative process", whereby the Court below would reinstate the harsh compensation order denying an award to a totally disabled beneficiary of the Act, grounded in a philosophy hostile to that reflected in the legislation, without substantial evidence in support thereof as required by 33 U. S. C. 920? This question is posed in the light of clear and convincing proof that the reversal of the District

Court order is predicated on a misapprehension of the facts inherent in petitioner's 35 year work record dramatically ended by total industrial blindness consequent on a shipboard accident which included a blow to the area of his eyes and the entry of grease therein, as related by all lay testimony without contradiction, on the basis of which all medical testimony would find causal connection, concurring with the unequivocal testimony of the impartial medical examiner appointed by the commission who stated it inconceivable and irreconcilable to find otherwise.

2. Assuming, but not conceding, that the total industrial blindness was rooted in previous experiences during petitioner's long maritime employment, should the Court below have considered and remanded the claim for further findings on the principle that petitioner's blindness is compensable even on the basis that the disability was cumulative and resulted from the nature of his employment so that the employer for whom petitioner was working at the time of the final exposure and breakdown might be liable?

Statement of the Case

Under oath and through a qualified interpreter, petitioner testified that on September 18, 1953, while employed by respondent Universal Terminal and Operating Corporation as a winchman aboard a vessel, in the course of lowering a boom, slack in the cable caused the wire to strike his face by the left eye, throwing his head back against the mast, and also causing grease to enter his left eye (1a, 2a, 3a).* That prior to the accident, always working as a deckman for approximately 35 years, his left eye was well and allowed him to observe distant signals and observe the

*Numbers in parenthesis with suffix "a", refer to petitioner-appellee's appendix to brief below; with prefix "UT" and suffix "a", refer to appendix to respondents-appellants Universal Terminal and The Traveler's Insurance Co. brief below.

work below in hatches (2a, 3a). It is significant that the uninjured right eye was industrially blind (13a, 19a).

Joseph Bianco, the gangwayman, testified that he observed a "great shock by the wire, by the cable, and Mr. Cascia, this guy here, was on this side. I saw he went this way (indicating)" (9a). He did not see petitioner struck by the cable, "but the cable must have hit him and he bunks against—I can't see, picture no show" (9a). He saw the left side of petitioner's head strike the mast (10a). Immediately thereafter petitioner told him he couldn't see, and Bianco had him taken to the office. The witness further testified that his signals to the winchmen were by moving his finger a distance of forty feet away (10a).

Ciro Olivero, the other winchman on deck, testified that he heard petitioner cry out "Wait a minute, I have got grease in my eye", and then he saw the cable strike petitioner on the face (16a, 17a), and saw him pull his head back (18a). This witness also testified that winchmen observe signals by the movement of the gangwayman's fingers, and that a winchman must be able to see down into the hatch being worked, a distance of about fifty feet (17a, 18a).

The opinion of the Court of Appeals below accepts the consistency of the Bianco and Olivero testimony with that of the petitioner (pp. 3a and 4a of the appendix to this petition).

The employer's safety director, John Marchione, called by the employer as a witness (5a), testified he was in the timekeeper's office when petitioner was brought in, stating he could not see and that he had grease in his left eye (5a). Not only did petitioner almost immediately after the accident state that grease came into his left eye when a "wire fall slapped", but also that "He said the wire cable hit him across the face" (6a). The opinion below erroneously states petitioner complained to Marchione "only that grease had entered his left eye" (pp. 4a and 5a of the appendix to this petition).

James Francis Perry, employed as the Timekeeper and also a witness for the employer (6a), testified that Marchione interpreted petitioner's remarks which he took down, where it was noted that petitioner complained of grease in his eye, and he observed there was grease all around the eye, "the cheekbone and all" (6a).

Medical Testimony

There were seven doctors who testified at the hearing; all but the impartial examiner for the commission were called by the employer. Dr. Mollica, who first examined petitioner and observed the grease particles in the left eye shortly after the accident, as well as related conjunctivitis, is a general practitioner; Dr. Rizzutti, who examined him the next day and testified concerning his industrial blindness in both eyes, specializes in eye diseases; Dr. Gerard who examined petitioner about six months after the accident, is an opthalmologist; Dr. Patella, a treating physician, examined petitioner first about 5 days after the accident; Dr. Gaynin, who examined petitioner on his behalf but testified as the employer's witness, examined him less than two months after the accident, and is an opthalmologist; Dr. Lordi, who examined petitioner eleven days after the accident, is an internal medicine diagnostician, and admitted his limitation as regards eye examinations; and Dr. Roberts, called by petitioner, the impartial opthalmologist for the commission, examined him less than four months after the accident.

Dr. Mollica testified that he examined petitioner a few minutes after the accident (UT 32a), and recorded the history that a wire fall snapped against the boom causing grease to fall into his left eye, and "Claimed he cannot see objects only light" without mention of being struck by the wire or striking his head against a mast (UT 33a). His examination revealed particles of grease over the left eyeball and a left conjunctivitis, without any other evidence of trauma (UT 33a). He removed the particles of grease.

anaesthetized the eye to relieve the irritation and referred petitioner to Dr. Rizzuti (UT 34a). On cross-examination Dr. Mollica admitted that he confined his examination to the eye and did not examine petitioner's head, and also there is absent any notation as to whether the history as recorded came from any source other than the petitioner himself (7a, 8a). He further testified that the grease particles cause a "burning sensation" in the eye (9a).

Dr. Rizzuti testified that the history was obtained from petitioner and a Dr. Patella, which was "while working as a winchman some grease went in my left eye" (UT 35a). His examination revealed that the left eye had "very poor vision", limited to hand movements observed six inches from his face, and that the right eye was 20/200 with scarring of the cornea (UT 35a, UT 36a). There were no abrasions or contusions on the face or eyeballs, and he diagnosed the left eye disability as a hemorrhage into the vitreous, explained as the seeping of blood "from one source or another" into the inner chamber of the eye, thereby preventing the retina from taking a clear picture and blinding the afflicted person (UT 36a). It was his opinion that the hemorrhage was old because there was no "strong aqueous flare" with slit lamp observation (UT 37a). The causes of vitreous hemorrhage are four or five: either spontaneous, a recurrent type of hemorrhage into the vitreous, with the cause unknown; the result of tuberculosis, diabetes or blood infections, such as syphilis; advanced arteriosclerosis; and trauma (UT 37a). Primarily because of the absence of any history other than grease entering the eye, which "certainly is not one of any great trauma", and the absence of serious injury to the region of the eyeballs or the lids, he concluded there was no traumatic basis to petitioner's blindness (UT 38a). On cross-examination it was conceded that there is no basis here for a spontaneous recurrence as the cause of the vitreous hemorrhage, as a rule seen in younger people (11a); that there was no evidence petitioner had or ever did have tuberculosis; that there was no proof of diabetes, and no

finding of blood system infection (11a). He admitted further that a vitreous hemorrhage can be caused by a blow to the area of the eye without any open injuries to the cornea or elsewhere about the eye, as "for example in fighters * * * In other words, you can press the eye with the fist, and as you remove the force, the removal of the force can give you a rupture of blood vessels, producing a vitreous hemorrhage" (12a). He unequivocally agreed that the blow of a wire cable to the area close to the eye "will be transmitted to what is underneath * * *" and could thereby cause a vitreous hemorrhage (13a). As regards grease causing an aggravation, he discounted this on the basis that he did not find any conjunctivitis (13a), despite Dr. Mollica's testimony that he had observed this condition and treated petitioner therefor for five days (7a, UT 34a). He agreed with the employer's counsel on redirect that the hemorrhage may have occurred four or five days before the accident, and could have cleared up or become more affected with the passage of time (14a). In his report to the carrier, Carrier's Exhibit G, Dr. Rizzutti referred to the right eye as being scarred with vision markedly reduced, so that together with the vitreous hemorrhage of the left eye "he should not be allowed to carry on with his usual type of employment" (UT 24a, UT 25a).

Dr. Gerard, who examined petitioner on behalf of the employer on May 12, 1954, admitted that the accident as described could be a competent and producing cause of the vitreous hemorrhage, but he found no causal connection on the basis of immediate subsequent medical findings (UT 30a, UT 31a). To predicate causal connection to the trauma he requires a blow of "considerable force" and a history of no pre-existing disability. On the basis of Dr. Rizzuti's findings he concludes the vitreous hemorrhage was not of recent origin (UT 31a). His examination disclosed the vision in the left eye to be nil, and because Dr. Rizzuti did not find a red fundus reflection, and in May 1954 he obtained a grayish fundus reflection, it seemed to him there was a hemorrhage of long standing, "a

matter of months and months development" (UT 31a, UT 32a). It is significant that Dr. Gerard's examination was approximately six months after the accident and his conclusion is grounded on Dr. Rizzuti's findings, not his own, and Dr. Rizzuti's findings are in part based on a history from a Dr. Patella, and in disregard of the immediate findings of conjunctivitis by Dr. Mollica, with irritation and the removal of foreign grease particles from his left eye. It was his testimony that if the left eye condition pre-existed, he would have had a loss of vision and his work performance would have depended on vision from the right eye (7a). Dr. Gerard's report to the carrier, Exhibit B, sets forth the extensive scarring in the right eye (UT 13a).

Dr. Patella testified in direct examination for the employer that when he first examined petitioner five days after the accident on September 23, 1954, "He had a conjunctivitis to the left eye" (7a).

Dr. Gaynin, a qualified opthalmologist and a witness for the employer, had examined petitioner on referral by his attorney on November 3, 1953 (UT 26a). Neither he nor his nurse knew Italian (19a) and the history set forth in the report is at some variance with petitioner's version, but nonetheless he concluded that "The pathology present in the left eye is causally related to the accident of 9/18/53. The patient at the present time is permanently and totally disabled" (UT 26a, UT 27a). This is predicated on a blow on the eye directly or to adjacent structures of the eye (18a), without any penetrating foreign body (19a). He clearly testified that the vision of the right eye alone would not have previously permitted petitioner to perform the task of a longshoreman (19a, 20a). Accepting Dr. Rizzuti's findings of arteriosclerosis in the right eye, Dr. Gaynin testified in response to a hypothetical question by the deputy commissioner that this "would make him more prone even with a milder type of injury to hemorrhage [illegible]. It is true

that a condition like that could also be spontaneous but if given the history that I have been given, I must say that, the accident could produce a vitreous hemorrhage" (20a). As regards Dr. Rizzuti's reliance on a red glare as the basis of finding a recent vitreous hemorrhage, he testified that an examination as soon as twelve hours later could not determine the recency, and "All I could say is that this man has a hemorrhage which fills his entire vitreous and that it isn't old enough to have organized" (21a). Without any contusions or abrasions of the face or eyelids, but the assumed facts of particles of grease over the left eyeball and the striking of petitioner's head, Dr. Gaynin testified "An injury such as you describe in your question could be a cause of starting an intra-ocular hemorrhage in a pre-disposed patient" (21a, UT 41a).

Dr. Lordi, who testified on behalf of the employer, stated he was told "grease from a boom of a wire (sic) hit his left eye", that he felt for about one and one half hours that he was burned with lye, and then lost vision in that eye ten minutes later though he denied having previous trouble with the eye" (UT 28a). Dr. Lordi's report to Dr. Patella, Exhibit A, states that petitioner had impaired vision in the right eye since the age of four, but no prior trouble with the left eye which now "Had no vision to fingers at all in left eye" (UT 9a, UT 10a). As regards his conclusion of no causal connection, it is important to note the witness is an internist and felt obligated to refer petitioner to an eye specialist for further examination. He was compelled to admit, however, that on the basis of petitioner's testimony before the deputy commissioner, the accident could "possibly cause the hemorrhage if his history is correct" (4a).

Dr. Bernard Alan Roberts, a Fellow of the American Board of Opthalmology, Fellow of the American College of Surgeons, Instructor of Post-Graduate and Under Graduate School of N. Y. U.-Bellevue Medical Center, Eye Pathologist of the New York Eye and Ear Infirmary, At-

tending Opthalmologist at Dover General Hospital and St. Claire's Hospital, Assistant Surgeon of the New York Eye and Ear Infirmary, and the examiner of petitioner in the capacity of *Impartial Examiner*, testified on behalf of petitioner (15a). His report to the Deputy Commissioner, Claimant's Exhibit 1, based on his examination of January 4, 1954, concludes that the amaurosis of the left eye caused by vitreous hemorrhage is "due directly to the cause alleged", with a "complete loss of field in the left eye", with no further improvement to be expected, a condition of "total blindness", and that he is now a visual cripple as his best vision "is a questionable 10/400 in his right eye". Further "It is not conceivable to this examiner that this man would have been able to in any way carry out the duties of a longshoreman prior to this accident if the left eye were totally blind as it is now" (UT 19a. UT 20a). The history recorded in his report was given through another who accompanied petitioner, to the effect he was struck by a cable on the left face area and some grease spattered into his left eye (UT 18a. UT 40a). In his testimony he found it difficult to reconcile the employer's version of grease alone striking the petitioner as a cause of the vitreous hemorrhage with the uncontradicted facts of his extensive employment prior to the accident which required observation of hand or finger signals at distances of 35 to 40 feet away, and required him to look down into a hold 50 feet away, or move or place a draft or sling of cargo, by stating "I don't see how he could * * *. I do not think it is reconcilable" (15a. 16a).

The deputy commissioner rejected the claim for compensation on the twofold and interrelated conclusions that the vitreous hemorrhage pre-existed the date of the injury, and that claimant did not sustain an accidental injury as alleged, *i.e.*, that in addition to the entry of grease in his eyes, a cable struck him in the area of his left eye (p. 12a of appendix to petition). This was reversed by the Chief

Judge of the United States District Court, Eastern District of New York, finding "After a thorough review of the entire record * * * that said compensation order is not in accordance with the law" (p. 7a of appendix to petition). On appeal by all respondents, the Court of Appeals reinstated the compensation order denying the claim (p. 1a of appendix to petition). Neither the deputy commissioner nor the Court below recognized that all lay testimony, including that of the safety director for the employer, supported petitioner's sworn testimony of being struck by the cable in the area of the left eye; and neither considered and decided on the principle of law that even if the disability were cumulative, and resulted from the nature of his employment, that the employer for whom petitioner was working at the time of the final exposure and breakdown would be responsible for compensation benefits.

Reasons for Granting the Writ

Reversal of the decision of the Court of Appeals and reinstatement of the District Court's decision is sought herein, because the Court of Appeals in its decision misapprehended the facts that showed all lay testimony favored petitioner's version of the accident, including that of the safety director which the opinion below erroneously stated was in contradiction thereto, whereby medical opinions predicated on this erroneous conflict of facts must all necessarily concur with that of the impartial medical examiner who testified that there must be causal connection on the basis of petitioner's complaint free work record for 35 years and the immediate blinding noted by the first treating physician minutes after the occurrence.

Without expressly saying so, the opinion of the Court of Appeals recognizes the harshness of the deputy commissioner's findings and its conflict with the humanitarian purpose of the Longshoremen's and Harbor Workers' Compensation Act, by referring to a "telling argument" ad-

vanced by petitioner's counsel that the left eye must have been unimpaired prior to the accident, and in view of Coscia's present physical condition, but in deference to a rigid purpose of preserving the "integrity of the administrative process"[4] strains to find evidence in the record not even alluded to by the parties, to support a denial which is not grounded in substantial evidence and is clearly erroneous in the light of the record as a whole. The medical testimony, predicated on examinations by all doctors, show that extensive scarring of the right eye with unquestioned limited vision since petitioner was 4 years of age, whereby only his injured left eye allowed his 35 year complaint free work record. There is no *substantial* evidence in the record to deny this truth!

It appears that the Appellate Court below failed to recognize the greater latitude of review allowed under the Administrative Procedure Act of June 11, 1956, 60 Stat. 237, 5 U. S. C. 1001 *et seq.*, so that a reviewing Court may more fully weigh the equities related to the burden of those opposing the claim under the Longshoremen's and Harbor Workers' Compensation Act by a required showing of "substantial" evidence, as contrasted with the limited scope of review in other cases. Cf. *McAllister* v. *U. S.*, 348 U. S. 19, 75 S. Ct. 6.

Finally, on the law as expressed by this Court and the permissive scope of appellate review which would set aside a deputy commissioner's order that denies compensation under the facts and circumstances herein, as well as the law related to the alternative ground of a cumulative disability that would prompt payments by the last employer, it likewise follows that the opinion below should be reversed.

Federal jurisdiction herein was obtainable in the first instance as this involved a matter of federal compensation under a federal act, arising out of maritime employment.

POINT I

The District Court properly concluded "after a thorough review of the entire record pertaining to the compensation order rejecting petitioner's claim * * * that said compensation order is not in accordance with the law".

It is axiomatic that judicial review is required to determine whether the deputy commissioner's choice has "substantial roots in the evidence and is not forbidden by the law". *Kwasizur* v. *Cardillo*, 175 Fed. 2d 235, 236, *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 67 S. Ct. 801.

By the Act, a claim must be recognized unless there is "substantial evidence to the contrary * * *", and that a compensation order may be set aside if not "in accordance with law", as found herein by the District Court. 33 U. S. C. 920, 921.

The scope of judicial review is related to the purpose of the Act, which this Court has found in the report of the Senate Committee accompanying the bill that was subsequently enacted, quoted in *Parker* v. *Motor Boat Sales*, 314 U. S. 244, 249, 62 S. Ct. 221, 225, as follows:

> "It thus appears that there is no way of giving to these hardworking men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation without enacting a uniform compensation statute."

This has been further defined in *Pillsbury* v. *United Engineering Co.*, 342 U. S. 197, 200, 72 S. Ct. 223, 225, as follows:

> "We are aware that this is a humanitarian act, and that it should be construed liberally to effectuate its purposes * * *"

The deputy commissioner's findings of fact herein are contrary to the purpose and philosophy of the Act as expressed by the legislators and this Court. These findings that the petitioner's version of the accident to the timekeeper was limited solely to some grease falling into his left eye, that examination of the eye immediately following the injury "disclosed no evidence of trauma", and sole reliance on subsequent alleged histories given by the illiterate petitioner to various doctors wherein emphasis was placed on the grease falling into his eye, are inapposite to the truth gleaned from the entire record, as follows:

1. As was clearly stated by the employer's witness Marchione, who interpreted petitioner's remarks immediately following the accident to the timekeeper Perry, petitioner not only stated that grease had entered his eye, but also "He said the wire cable hit him across the face". The accident report on which the respondents and their doctors apparently rely contains an aborted history, obvious from the testimony of Marchione who was told of the cable striking petitioner's face, and the testimony of Perry, who executed the form incompletely on Marchione's interpretation. The Court below errs in its opinion where it states the safety director was not told by petitioner of having been struck on his head by the cable (p. 4a, 5a of appendix to petition).

2. The testimony of Dr. Mollica, who saw him first after the accident for medical attention, is that he observed a related conjunctivitis, *i.e.*, a reddening in the eye related to trauma, with irritation and pain requiring anaesthesia. It is corroborated by Dr. Patella, another witness for the employer, that this conjunctivitis was observed by him as late as five days after the accident. Any other medical testimony predicated on a disregard of these basic findings by the treating compensation doctors are as unrealistic as the deputy commissioner's findings.

3. The deputy commissioner does not refer to or assess the testimony given under oath by the fact witnesses who

observed the accident and the trauma where petitioner was first struck by the cable and then caused the striking of his head against the mast in an attempt to escape the blow. That the illiterate petitioner's purported version of the accident to several of the many doctors to the effect that grease entered his eye, without mention of the other elements of trauma which may not have been properly elicited or deemed by him of sufficient consequence for a medical examination, cannot be the basis of blindness in the findings that in fact the trauma included the blows to the head and eye area sufficient to prompt a vitreous hemorrhage.

4. Accordingly, there is no conflict in the lay testimony as to the occurrence of the accident and the striking of petitioner's head and face, and there is no conflict that petitioner did sustain some injury. Though the extent of the injury is in dispute, and the deputy commissioner chose to disregard the testimony of the Impartial Examiner who found unequivocally that the accident caused the vitreous hemorrhage (UT 19a, 20a), we are confronted with the truth that he became industrially unemployable after the trauma, whereas he enjoyed a previous work record of approximately 35 years.

In *Gooding* v. *Willard*, 209 F. 2d 913, 916, the Court spoke of administrative findings and judicial review, as follows:

> "As is pointed out in the opinion in the last mentioned case, 'substantial evidence' means more than evidence which, considered by itself alone, would be sufficiently persuasive to induce the trier of fact to give it the credence and weight essential to support findings. *It must have those characteristics to such an extent that in the setting made by the entire record* the trier may reasonably find in accordance with it after giving due consideration to whatever else is shown both in opposition or in accord. *Judicial review has been extended by the Adminis-*

> *trative Procedure Act to embrace adequate exploration of the record as a whole to enable the reviewing court to arrive at its own judgment in determining that.*" (Italics supplied.)

For an injury to be compensable there must be a disability. Disability has been defined by 33 U. S. C. A. 902(10) as follows:

> "'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

On the basis of the uncontradicted testimony by all witnesses to the accident and immediately thereafter, as well as petitioner's inability to do the work of a longshoreman he had been doing for 35 years before the accident, it was necessary and proper for the learned District Court Judge to reverse the deputy commissioner's unrelated findings.

Both the concurring opinions of Mr. Justice Douglas and of Mr. Justice Frankfurter in *Wilkerson* v. *McCarthy*, 336 U. S. 53, 69 S. Ct. 413, are pertinent to petitioner's contention that the deputy commissioner misconceived the purpose and philosophy of the Act, so not to allow findings which must leave a firm and definite conviction that a mistake had been committed. Though the *Wilkerson* case, *supra*, concerned the Federal Employers' Liability Act, 45 U. S. C. 51, where negligence must be proven, the following by Mr. Justice Douglas must apply with stronger effect to the compensation act herein:

> "The purpose of the Act was to change that strict rule of liability, to lift from employees the 'prodigious burden' of personal injuries which that system had placed upon them, and to relieve men 'who by the exigencies and necessities of life are bound to labor' from the risks and hazards that could be avoided or lessened. * * * In fact, a decision not to correct it was to let the administration of this law

be governed not by the aim of the legislation to safeguard employees but by a hostile philosophy that permeated its interpretation" (pp. 68, 69 of 336 U. S).

In his concurring opinion Mr. Justice Frankfurter referred to the "cruel and wasteful mode of dealing with industrial injuries", that has been replaced in industry by the insurance principle of compensation (p. 65 of 336 U. S.).

It follows that to allow a compensation order of the nature involved herein to stand, simply by reason of a rigid adherence to the sanctity of the administrative process clothed with even greater respect than afforded a District Judge, would be "cruel and wasteful" and a precedent that must strike at the heart of the Act to the detriment of thousands of longshoremen covered by it. The propriety of any inference or finding is "vital to the validity of the order subsequently entered". *Cardillo, Deputy Commissioner* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469, 477, 67 S. Ct. 801, 806. There is no real conflict in the sworn testimony and no inference to be fairly drawn from the record that would deny petitioner his right to compensation.

POINT II

Petitioner's blindness is compensable even on the basis that the disability was cumulative and resulted from the nature of his employment on the principle that the "injury" occurs at the time of disablement.

The Act defines "injury" as meaning "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury * * *." 33 U. S. C. 920, paragraph 2.

It has been indicated that an eye burn suffered from welding light flashes over a period of time might be an occupational disease for a welder. *Great American Indemnity Co.* v. *State Compensation Insurance Fund*, 108 Colo. 323, 116 P. 2d 919; and in *Zajkowski* v. *American Steel & Wire Co.*, 258 F. 9, it was held that the operator of sheet steel finishing rolls who was blinded by the strong glare of powerful light from the glittering surfaces over a period of two years had suffered an "occupational disease".

The rule generally accepted is that the "injury" occurs when the accumulated effects of the injurious exposure manifest themselves, so that there is a compensable injury when the continued exposure reaches the point where it pushes the employee "over the hump" and the condition renders the employee disabled. *Urie* v. *Thompson*, 337 U. S. 163, 69 S. Ct. 1018; *North End Foundry Co.* v. *Ind. Comm.*, 217 Wis. 363, 258 N. W. 439, 443. See: *Grain Handling Co.* v. *Sweeney*, 102 F. 2d 464, 465, in which the Court held compensation for an occupational disease follows where "a workmen must be exposed to hazards greater than those involved in ordinary living, and the disease must arise from one of these".

It follows therefore that the employer for whom the employee is working at the time of the final exposure and breakdown is liable. *Russo* v. *Despatch Shops, Inc.*, 116 N. Y. S. 2d 788 (1952).

In an unreported decision under the Longshoremen's Act, *Easton et al.* v. *Cardillo*, Civil Action No. 18268 in the U. S. District Court for the District of Columbia, decided April 15, 1953, the Court said:

> "* * * I also think the well supported rule which holds liable the last employer—he for whom the claimant was working when actual disability occurred—is the only practicable rule to apply in cases of this kind. Only thus, in such cases, can the beneficient purposes of workmen's compensation statutes be assured."

Turning to the record, we have the uncontradicted testimony that petitioner had worked for 35 years as a longshoreman on the decks of vessels, exposed to all the hazards that have prompted our Courts to fit him in the mold of seamen, and who has ceased to have any working capacity because of blindness immediately following his employment for respondent stevedore. Assuming, but not conceding, that his disability was solely rooted in previous experiences during his long maritime employment, it follows that the disability is compensable by the employer at the time of disablement.

On the principle of aggravation or precipitation of a dormant condition, it has been held that full indemnification follows irrespective of any pre-existing idiosyncrasy. *U. S. F. & G. v. U. S. A.*, 152 Fed. 2d 46, 49.

In *Winchester Milling Corp. et al.* v. *Sencendiver et al.*, 138 S. E. 479, the Supreme Court of Appeals of Virginia held in a like rational vein, as follows:

> "It is undisputed that prior to the injury the claimant had been most regular in the performance of his duties, and that there is nothing in the record to indicate that he had ever complained of illness of any kind prior to the injury."

The Supreme Court of Washington in *Loveless* v. *Red Top Cab Co.*, 291 P. 344, cites Cooley on Torts (2d Ed.), page 76, in support of this principle, as follows:

> "If the original act was wrongful and would naturally, according to the ordinary course of events, prove injurious to some other person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent."

It has been held that responsibility for a disability may be imposed even though it is clear that the employment was not the sole factor in causing the disability. Thus,

the employer is liable for a disability arising out of the employment even though it would not have occurred except for a pre-existing infirmity of the employee. See, *e.g.*, *Friend* v. *Britton*, 220 F. 2d 820 (C. C. A. D. C.), *Hoage* v. *Employers' Liability Assurance Corp.*, 64 F. 2d 715, cert. den. 290 U. S. 637.

The reversal by the District Court of the strained findings by the deputy commissioner is eminently fair and proper in the light of the entire record. These findings were predicated on a complete disregard of the credible testimony presented by all fact witnesses, and enlarges on medical conclusions that ignored the only acceptable version of the accident which included trauma about the head and affected eye, as well as the reddening by conjunctivitis as recorded by both treating physicians. Most important, these findings ignored the principles of law and practical common sense that a complete disability following a complaint free work record of thirty-five years must be related to the intervening cause.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted and that this Honorable Court reverse the Court below and reinstate the original judgment of the District Court, or, in the alternative, to remand this cause for further findings discussed in Point II hereof.

Dated: Brooklyn, New York, September 17, 1958.

VINCENZO COSCIA,
Petitioner.

By: PHILIP F. DICOSTANZO,
Attorney.

ROBERT KLONSKY,
on the Petition.

APPENDIX

Opinion of United States Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 318—October Term, 1957

(Argued May 2, 1958 Decided June 30, 1958)

Docket No. 24947

VINCENZO COSCIA,

Petitioner-Appellee,

v.

JOHN A. WILLARD, as Deputy Commissioner of the United States Department of Labor Bureau of Employee's Compensation, Second Compensation District, and UNIVERSAL TERMINAL AND STEVEDORING CORPORATION and THE TRAVELERS INSURANCE COMPANY,

Respondents-Appellants.

Before:

CLARK, *Chief Judge,*
HINCKS and STEWART, *Circuit Judges.*

Appeal from a summary judgment of the United States District Court, for the Eastern District of New York, Robert A. Inch, *Chief Judge*, setting aside an order of the Deputy Commissioner which had denied a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act. Reversed and remanded with directions to dismiss complaint.

PHILIP F. DI COSTANZO, Robert Klonsky, of counsel, of Brooklyn, New York, *for petitioner-appellee.*

ROBERT S. GREEN, Department of Justice, Washington 25, D. C. (George Cochran Doub, Assistant Attorney General, Cornelius W. Wickersham, Jr., United States Attorney, Samuel D. Slade, Department of Justice, Washington 25, D. C., on the brief), *for respondent-appellant John A. Willard.*

GALLI & LOCKER, Urban S. Mulvehill, of counsel, New York, New York, *for respondents-appellants Universal Terminal and Stevedoring Corporation and The Travelers Insurance Company.*

STEWART, *Circuit Judge.*

On September 18, 1953, Vincenzo Coscia was employed by Universal Terminal and Stevedoring Corporation as a winchman on board the steamship "African Crescent," which was then moored at Brooklyn, New York, discharging cargo. Alleging that he has sustained an injury arising out of and in the course of his employment on that day, Coscia filed a claim under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., §§ 901, *et seq.*, asking compensation for permanent total disability.

After an extensive hearing the Deputy Commissioner rejected the claim in an order based upon his findings of fact. Coscia then filed an action in the district court to set aside this order. The court entered summary judgment for Coscia, holding simply that the Deputy Commissioner's order was "not in accordance with law" and remanding the

case for "further proceedings in accordance with law." This appeal followed.

The only issue here is whether the Deputy Commissioner's order was supported by substantial evidence on the record considered as a whole. If so, the district court was in error in setting the order aside. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504, 508 (1951); *Gooding* v. *Willard*, 209 F. (2d) 913, 916 (2 Cir., 1954).

Several basic facts were established by undisputed evidence at the administrative hearing. Coscia was a longshoreman of thirty-five years experience who had suffered from impaired vision in his right eye during his entire adult life. He was on the day in question engaged in employment covered by the federal compensation statute. While he was occupied with a fellow employee in trying to lower a boom on the "African Crescent," an accident of some nature occurred, and Coscia thereafter complained that he was unable to see out of his left eye. He was examined by a physician a few minutes later, by another physician the following day, and by several other physicians during the ensuing months, and these examinations all showed that Coscia was almost totally blind in his left eye. The loss of vision was the result of a vitreous hemorrhage.

Upon two interdependent and controlling factual questions the evidence before the Deputy Commissioner was in conflict: What was the nature of the accident that befell Coscia as he was attempting with his fellow longshoreman to lower the boom? Did any injury he then sustained contribute to cause the loss of vision in his left eye?

At the hearing Coscia testified that he had been struck on the left eye by a wire cable, and that his head had been thrown back against the mast. The testimony of two eyewitnesses to the occurrence was somewhat inconclusive.

but not inconsistent with Coscia's story.[1] Coscia's own eye specialist, whom Coscia had consulted some six weeks after the occurrence, testified that Coscia had given a history of being struck on the left eye. Two other physicians who had not examined Coscia until several months after the accident also testified that he had given them a similar history.

On the other hand, the safety director to whom Coscia complained immediately after the occurrence, the physician who examined him a few minutes later, the physician who saw him the following day, and one who examined him ten

---

[1] Testimony of Joseph Bianco:

[Bianco] "I saw there was a great shock by the wire, by the cable, and Mr. Cascia, this guy here, was on this side. I saw he went this way. (Indicating) I couldn't see on the other side, but the cable must have hit him and he bunks against—I can't see, picture no show."

"Q. Where did the cable hit him? In the eye? A. I was on this side. I couldn't see the face. I saw from the back. When he was working he showed me his back. I see the face of the other guy, because one was over here, and one was over here. (Indicating) He was covered from here."

"Q. You didn't see the face, you saw the back? A. Yes."

"Q. You saw Mr. Cascia's head go back? A. Yes."

"Q. You are not sure whether the cable actually hit him on the face. A. I don't see that. I was coming from behind, going up with the ladder. The ladder, this side. I couldn't see the face. I could see the back only."

Testimony of Chiro Oliviero:

"Q. And can you tell us now exactly what happened that day while you were lowering this boom? A. While we were engaged in lowering this boom, plenty of slack, Cascia cried out, 'wait a minute, I have got grease in my eye,' and at that moment the slack that was around the bit swung and struck Cascia.

"Q. Now, did the slack that you were feeding hit him, or did something else hit him? A. The slack on the cable vibrated from side to side and striking him on the face."

days later, all testified that Coscia had complained only that grease had entered his left eye, and that he had not mentioned being struck on his eye or head. None of the witnesses who observed Coscia immediately after the accident saw any evidence of trauma, such as contusion or abrasion. The physician who first examined him observed only a mild conjunctivitis in Coscia's left eye and found some particles of grease, which he removed.

As to whether there was or could have been a causal relationship between the accident of September 18, 1953, and the loss of vision in Coscia's left eye, the evidence was also in conflict. It was the specialist who examined Coscia the day after the accident who determined that the loss of vision was caused by a vitreous hemorrhage. He testified that the vitreous hemorrhage was an old one, unrelated in his opinion to the accident of the day before. He also stated that there are several possible causes of vitreous hemorrhage, including arteriosclerosis, a condition from which Coscia was apparently suffering. Other physicians who testified concurred in the opinion that there could have been no causal connection between the accident and Coscia's blindness. Upon the assumption, however, that Coscia's version of the nature of his accident was accurate, two of the medical experts testified that there was or could have been a causal relation between the accident and the loss of vision.

Upon this record the Deputy Commissioner found that while Coscia was "employed as a longshoreman for the employer herein, some grease from a wire fall entered his left eye; * * * that the claimant's loss of vision in the left eye was due to a vitreous hemorrhage which antedated the date of the alleged injury; that the entry of grease in the left eye did not aggravate said vitreous hemorrhage and caused no loss of vision; and that the claimant did not sustain accidental injury as alleged at the hearing." The order of the Deputy Commissioner rejecting the claim for compensation was based upon these findings.

One telling argument is advanced by counsel in support of the district court's judgment setting aside this order. It is pointed out that there was evidence that for many years Coscia had been "industrially blind" in his right eye, and that therefore his left eye must have been unimpaired up to the time of the accident to permit him to perform the duties of a winchman, which required him to observe hand signals from thirty or forty feet away and to see down into the hold of a ship a distance of fifty feet or more. But upon this phase of the case the evidence was also in conflict. While it was established that the vision in Coscia's right eye had long been impaired, the expert witnesses disagreed as to the extent of the impairment. Coscia himself testified on direct examination that he could see "a block and a half" with his right eye. He stated that he had had "some little trouble with vision in the right eye, but I never went to a doctor and I bathed the eye at times."

It follows that the Deputy Commissioner's findings and order were substantially supported by the record considered as a whole. It was his exclusive function to assess the credibility and reliability of the witnesses. *Gooding* v. *Willard*, 209 F. (2d) 913 (2 Cir., 1954); *Kwasizur* v. *Cardillo*, 175 F. (2d) 235 (3 Cir., 1949). It was for him alone to determine what permissible inferences to draw from the facts. *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U. S. 469 (1947); *Parker* v. *Motor Boat Sales*, 314 U. S. 244 (1941). In setting the order aside the district court, therefore, exceeded the permissible scope of judicial review. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504 (1951); *Del Vecchio* v. *Bowers*, 296 U. S. 280 (1935).

In view of the humanitarian purpose of the Longshoremen's and Harbor Workers' Compensation Act, and of Coscia's present physical condition, this conclusion has not been easily reached. But if the integrity of the administrative process is to be preserved in this case, the Deputy Commissioner's order must be upheld.

The judgment is set aside and the case remanded with directions to dismiss the complaint.

Memorandum of Decision of Robert A. Inch, U.S.D.J.

June 19, 1957

Before INCH, *J.*

Civ. 15712

VINCENZO CORCIA,

vs.

JOHN A. WILLARD, etc.,

and

UNIVERSAL TERMINAL & STEVEDORING CORP., et al.

Motion for an order granting summary judgment to the respondent, John A. Willard as Deputy Commissioner of the U. S. Department of Labor and complaint.

Appearances:

LEONARD P. MOORE, U. S. Attorney for Respondent Willard, by LLOYD H. BAKER, Assistant U. S. Attorney.

PHILIP F. DiCOSTANZO, Attorney for Petitioner.

GALLI & LOCKER, Attorneys for Resp. Universal and Travelers Ins. Co. by MR. MULVEHILL.

Motion submitted, all papers by 6/24/57

After a thorough review of the entire record pertaining to the compensation order rejecting petitioner's claim, I find that said compensation order is not in accordance with the law. Therefore, the motion for summary judgment by respondent, John A. Willard, is denied and request for summary judgment by petitioners is granted to the extent that said compensation order is set aside and this matter is remanded to said respondent for further proceedings in accordance with the law.

July 22, 1957.

ROBERT A. INCH,
Chief Judge of U. S. D. C., E. D. N. Y.

Order of Judge Inch, October 7, 1957

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

Respondent, John A. Willard, having moved this Court by notice of motion dated April 19, 1957 for an Order granting summary judgment to the respondent, John A. Willard, as Deputy Commissioner o fthe United States Department of Labor, and dismissing the complaint herein. and said motion having duly come on to be heard before me on the 26th day of June, 1957,

Now, on reading the affidavit of Lloyd H. Baker, verified the 19th day of April, 1957, and the affidavit of Urban S. Mulvehill, verified the 8th day of May, 1957, in support of said motion, and the affidavit of Philip F. DiCostanzo, verified the 12th day of July, 1957 in opposition thereto, together with the official report of proceedings before the Honorable John A. Willard, Deputy Commissioner of the Second Compensation District of the United States Department of Labor, and plaintiff's memorandum in opposition to respondent, Willard's motion for summary judgment, and after due deliberation having been had thereon, and the court after a thorough review of the entire record pertaining to the compensation order rejecting petitioner's claim having found that said compensation order is not in accordance with law, and plaintiff having moved for an order reversing the respondent, Willard's formal order of July 6, 1955, rejecting the petitioner's claim for compensation and further providing that this matter be referred

Order of Judge Inch, October 7, 1957

back to the Deputy Commissioner with instructions to issue a formal order awarding the petitioner compensation payments, and benefits in accordance with the provisions of the United States Harbor Workers' Compensation Act.

Now, on motion of Philip D. DiCostanzo, it is hereby

ORDERED, that respondent's motion for summary judgment is denied, and it is further

ORDERED, that the request for summary judgment by the petitioner is granted to the extent that said compensation order is set aside and the matter is remanded to the said respondent, John A. Willard for further proceedings in accordance with law.

Dated: Brooklyn, N. Y., October 7, 1957.

ROBERT A. INCH,
U. S. D. J.

Findings of Fact and Decision of Deputy Commissioner

UNITED STATES DEPARTMENT OF LABOR

BUREAU OF EMPLOYEES' COMPENSATION

SECOND COMPENSATION DISTRICT

Compensation Order Rejection of Claim

Case No. 5333-3154

In the Matter of the Claim for Compensation under the Longshoremen's and Harbor Workers' Compensation Act.

VINCENZO COSCIA,

Claimant.

against

UNIVERSAL TERMINAL & STEVEDORING CO.,

Employer.

THE TRAVELERS INSURANCE COMPANY,

Insurance Carrier.

Such investigation in respect to the above entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

That on the 18th day of September 1953, claimant above-named was in the employ of the employer above named at Brooklyn, New York, in the Second Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by The Travelers Insurance Company; that on said day, the claimant herein was employed as a winchman discharging the SS "AFRICAN CRESCENT"

which was afloat in New York Harbor at Brooklyn, New York; that about 4:00 P. M. of said day he reported at the office of the timekeeper for the employer and gave the history that, while lowering a boom on said vessel, the wire fall snapped against the ship's mast causing some grease to fall into his left eye; that he complained of a loss of (6) vision in his left eye and was taken immediately to the doctor's office where he was treated and he gave the following history—"while working in #2 hatch on the deck as a winchman, while lowering a boom the wire fall snapped against boom causing grease to fall into man's left eye"; that examination of the claimant in the area of the left eye immediately following the injury disclosed no evidence of trauma; that on the following morning, September 19, 1953, because of the claimant's complaints of impaired vision, he was examined by an eye specialist to whom he gave the following history—"while working as a winchman, some grease went into his left eye"; that examination of the claimant's left eye by this doctor disclosed the presence of a vitreous hemorrhage with consequent loss of vision in the left eye, but no evidence of external or intra ocular trauma; that on September 29, 1953, he was examined by a specialist of internal medicine to whom he gave the history that grease from the wire cable of a boom hit his left eye; that on November 3, 1953, claimant was examined by his own eye specialist and gave the following history—"while working on September 18, 1953, hoisting cargo, a load slipped and fell against the patient's face, nose and left eye; something sharp went into his left eye; his left eye was covered with grease; that on May 12, 1954 claimant was examined by an eye specialist for the carrier to whom he gave the history that "while working as a winchman on the deck of the SS "AFRICAN CRESCENT", the boom of the winch fell, causing cable to strike his left eye; at the same time the force was so strong it caused his head to

bounce backward against the mast''; that at the hearing the claimant alleged that he was helping to lower a boom on said vessel when a slack in the wire cable caused the boom to drop suddenly, taking up the slack in the wire cable and causing it to lash out and strike him over the left side of his face and eye with sufficient force to throw him against the ship's mast 6 inches away, striking same with the left side of his face; that it is further alleged that, as a result thereof, he suffered the entire loss of vision in the left eye, resulting in (7) permanent, total disability; that it is found that on September 18, 1953, while employed as a longshoreman for the employer herein, some grease from a wire fall entered his left eye; that the employer furnished the claimant with medical treatment, etc. in accordance with Section 7 (a) of the Act; that the claimant's loss of vision in the left eye was due to a vitreous hemorrhage which antedated the date of the alleged injury; that the entry of grease in the left eye did not aggravate said vitreous hemorrhage and caused no loss of vision; that the claimant did not sustain accidental injury as alleged at the hearing.

Upon the foregoing facts, it is ordered by the Deputy Commissioner that the claim for compensation be and it is hereby rejected for the following reasons:

1. Loss of vision in the left eye was due to vitreous hemorrhage which preexisted the date of alleged injury and is unrelated thereto.

2. Claimant did not sustain an accidental injury as alleged.

Given under my hand at 641 Washington Street, New York, N. Y., this 6th day of July 1955.

JOHN A. WILLARD
Deputy Commissioner
Second Compensation District

Findings of Fact and Decision of Deputy Commissioner

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, his attorney, the employer and the insurance carrier at the last known address of each as follows:

Mr. Vincenzo Coscia, 2304 McDonald Avenue, Brooklyn, N. Y.

DiCostanzo & Lumia, Esqs., 66 Court St., Brooklyn, N. Y.

Universal Terminal and Stevedoring Co., 24 State St., New York, N. Y.

Travelers Insurance Co., 80 John St., New York, N. Y.

JOHN A. WILLARD,
Deputy Commissioner.

Mailed July 6 1955
B 7400546

Opinion on Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

Before:

CLARK, *Chief Judge*, and HINCKS and STEWART, *Circuit Judges*.

On Petition for Rehearing.

PHILIP F. DI COSTANZO, Brooklyn, N. Y. (ROBERT KLONSKY, New York City, of counsel), for petitioner-appellee.

PER CURIAM:

Petition for rehearing denied.

C. E. C.
C. C. H.
P. S.
U. S. C. JJ.

August 8, 1958.

FILE COPY

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FILED
OCT 20 1958
JAMES R. BROWNING, Clerk

No. 332

In the Supreme Court of the United States

OCTOBER TERM, 1958

VINCENZO COSCIA, PETITIONER

v.

JOHN A. WILLARD, as Deputy Commissioner of the United States Department of Labor Bureau of Employees' Compensation, Second Compensation District, and UNIVERSAL TERMINAL AND STEVEDORING CORPORATION and THE TRAVELERS INSURANCE COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR RESPONDENT JOHN A. WILLARD, DEPUTY COMMISSIONER, IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

SAMUEL D. SLADE,
ROBERT S. GREEN,
Attorneys,
Department of Justice,
Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 392

VINCENZO COSCIA, PETITIONER

v.

JOHN A. WILLARD, as Deputy Commissioner of the United States Department of Labor Bureau of Employees' Compensation, Second Compensation District, and UNIVERSAL TERMINAL AND STEVEDORING CORPORATION and THE TRAVELERS INSURANCE COMPANY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT JOHN A. WILLARD, DEPUTY COMMISSIONER, IN OPPOSITION

OPINIONS BELOW

The decision of respondent John A. Willard, Deputy Commissioner, appears at page 10a of the Petition. The decision of the District Court (Pet. 7a) is not officially reported. The opinion of the Court of Appeals (Pet. 1a) is reported at 257 F.2d 105.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (Pet. 1a) and a timely petition for

rehearing was denied on August 8, 1958 (Pet. 14a). The petition for a writ of certiorari was filed on September 22, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(c).

QUESTION PRESENTED

Whether the determination of the Deputy Commissioner that petitioner's loss of vision did not result from his employment was supported by substantial evidence.

STATUTE INVOLVED

Section 21(b) of the Longshoremen's and Harbor Worker's Compensation Act, 44 Stat. 1436, as amended, 33 U.S.C. 921(b), provides as follows:

> If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the United States District Court for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the Uni[illegible]d States. The payment of the amounts required [illegible]n award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage

would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

STATEMENT

Petitioner instituted these proceedings to set aside an order of the Deputy Commissioner denying his claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act for total loss of vision in his left eye. The evidence presented at the hearing before the Deputy Commissioner may be summarized as follows:

On September 18, 1953, the day on which his alleged injury took place, petitioner was employed as a winchman unloading a ship (T. 5-6).[1] At about 4:00 P.M. of that day, he reported to the timekeeper and stated that, while lowering a boom on the vessel, the wire fall snapped against the ship's mast and caused some grease to fall into his left eye (T. 7-8, 40, 45-46). He complained of a loss of vision in this eye, and was immediately taken to the office of Dr. John J. Mollica, where he told the same story, and where he was treated (T. 103-106). Examination at that time showed no evidence of trauma, such as contusion or abrasion (T. 105). On the following morning, petitioner was examined by an eye specialist,

[1] References "T. " are to the typewritten transcript of the proceedings before the Deputy Commissioner, which forms part of the record in this Court.

Dr. Benedict Rizzuti, again stating merely that some grease had gotten into his eye (T. 148-153). Dr. Rizzuti's examination disclosed the presence of a vitreous hemorrhage with consequent loss of vision in the left eye, but no evidence of trauma (T. 149-150). Dr. Rizzuti later testified that petitioner had made no claim of being struck in the eye or on the head, and that the vitreous hemorrhage was an old one, and not in any way related to the incident of getting grease in the eye; he testified that such vitreous hemorrhage could be caused by arteriosclerosis, and that since petitioner had evidence of arteriosclerosis in his right eye (in which he had only 20/200 vision) he assumed the same condition caused the vitreous hemorrhage in the left eye (T. 150-153; Exh. G, T. 247-250). On September 29, 1953, petitioner was examined by a specialist in internal medicine, Dr. George H. Lordi, to whom he again complained only that grease from a boom or wire hit his eye (T. 27-28; Exh. A. T. 87-89). Dr. Lordi testified that his examination disclosed "very abnormal" hypertension, or high blood pressure, which is usually associated with arteriosclerosis or other disease; and that in his opinion there was no causal relationship between the accident and the loss of vision in petitioner's left eye (T. 26-27). All three of these doctors—Drs. Mollica, Rizzuti, and Lordi—testified that they spoke Italian, and had or probably had conversed with petitioner and taken his history in this language; and all three stated that petitioner had complained only of grease getting in his eye, and had made no complaint of being struck by the boom or wire (T. 104, 111; 149;

27-28). In addition, both the timekeeper and the employer's safety director testified that, immediately after the accident, petitioner complained only of getting grease in his eye, not of being struck (T. 40, 50).

On November 3, 1953, petitioner was examined by his own eye specialist, Dr. Henry Gaynin, to whom he stated that he had been struck by the boom or its load, that something sharp went into his left eye, and that his eye was covered with grease (Exh. H, T. 250). On May 12, 1954, petitioner was examined by Dr. H. Charles Girard, an eye specialist for the insurance carrier, to whom he reported that while unloading cargo the boom of the winch fell, causing the cable to strike his left eye, and at the same time bouncing his head back against the mast (Exh. B, T. 90). Dr. Girard testified that in his opinion there was no causal relationship between the accident of September 18, 1953, and petitioner's loss of vision (T. 61-62; Exh. B, T. 97-98).

On January 4, 1954, petitioner was examined by Dr. Bernard Roberts, to whom he reported that he had been struck on the face and eye by the cable from the boom (Exh. I, T. 199-202). Both Dr. Roberts and Dr. Gaynin, to whom petitioner had given the same version of the accident, testified that there was or could have been a causal relationship between such an accident and petitioner's loss of vision (T. 177-179; Exh. I, T. 199-202; Exh. H, T. 250-252).[2]

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[2] Dr. Roberts, however, testified further that if the accident consisted only of getting grease in the eye, as petitioner had originally reported, then he would assume that there was no causal relationship between the accident and petitioner's loss of vision (T. 179).

Petitioner himself testified that he was struck in the face on the left eye by the fall, which had grease on it, and that the left side of his face was thrown against the mast (T. 5-7). The testimony of two fellow-workers, who were eye-witnesses, "was somewhat inconclusive" (as the Court of Appeals said) "but not inconsistent with Coscia's story" (Pet. App. 3a-4a).

On this conflicting evidence, both as to the nature of the accident itself and the cause of petitioner's loss of vision, the Deputy Commissioner found (Pet. 12a) that " * * * on September 18, 1953, while employed as a longshoreman for the employer herein, some grease from a wire fall entered [petitioner's] left eye;" that petitioner's "loss of vision in the left eye was due to a vitreous hemorrhage which antedated the date of the alleged injury;" that "the entry of grease in the left eye did not aggravate said vitreous hemorrhage and caused no loss of vision;" and that petitioner "did not sustain accidental injury as alleged at the hearing."

The District Court rejected these findings, holding simply that they were "not in accordance with the law" (Pet. 7a). The Court of Appeals reversed the District Court and ordered petitioner's complaint dismissed (Pet. 1a-6a). That court noted (Pet. 3a) that the "only issue here is whether the Deputy Commissioner's order is supported by substantial evidence on the record considered as a whole," and, after an extensive review of all of the evidence (Pet. 3a-6a), determined that the order was so supported and therefore must

stand. The opinion of the court of appeals concluded (Pet. 6a):

> In view of the humanitarian purpose of the Longshoremen's and Harbor Worker's Compensation Act; and of Coscia's present physical condition, this conclusion has not been easily reached. But if the integrity of the administrative process is to be preserved in this case, the Deputy Commissioner's order must be upheld.

ARGUMENT

The record of the extensive hearing before the Deputy Commissioner—including the testimony of petitioner, his employer's timekeeper and safety director, his fellow workers, and no less than seven doctors—contains ample evidence to support the administrative determination. The appellate court applied established principles of law in holding that this determination was therefore binding upon the courts. There is no basis for further review.

1. It is, of course, well settled that the Deputy Commissioner's findings, both as to the facts themselves and the inferences to be drawn therefrom, "are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole." *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508; see, *e.g. Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469; *Parker* v. *Motor Boat Sales*, 314 U.S. 244. The decision of the Deputy Commissioner rested upon his resolution of "two interdependent and controlling factual questions * * *" (Pet. 3a): whether the petitioner's eye was in fact struck by

the wire fall, and whether this accident caused or contributed to his loss of vision. The administrative findings determining each of these issues against petitioner were clearly supported by substantial evidence, and hence were properly held to be conclusive.

a. With respect to the accident itself, petitioner's testimony at the hearing that he was actually struck on the eye by the fall or boom is contradicted by his own contemporaneous statements to the timekeeper and the safety director, his statements to Doctors Mollica and Rizzuti immediately following the accident, and his statement eleven days later to Dr. Lordi. In each case, petitioner is reported as complaining only of grease entering his eye; he made no complaint of being struck by the wire or boom, and there was no evidence of trauma, such as contusion or abrasion. In the light of this square conflict of evidence, the Deputy Commissioner did not act arbitrarily in rejecting petitioner's claim that he was struck by the fall or boom; indeed, the Deputy Commissioner is not "bound to accept the truth of the [claimant's] story, even though it were not contradicted, if it seemed to him, as the trier of facts, an improbable one." *Kwasizur* v. *Cardillo*, 175 F. 2d 235, 237 (C.A. 3), certiorari denied, 338 U.S. 880.

b. Equally unassailable to judicial challenge is the determination by the Deputy Commissioner, on conflicting medical evidence, that petitioner's loss of vision in his left eye was due to a vitreous hemorrhage which antedated the alleged injury, and that the entry of grease into that eye did not aggravate the pre-existing hemorrhage or cause loss of vision.

These findings were based upon the testimony of three doctors—Dr. Rizzuti, Lordi and Girard—all of whom testified that in their opinion there was no causal connection between the accident and petitioner's loss of vision. The Deputy Commissioner was entitled to believe the testimony of these doctors rather than the two doctors who supported petitioner's position.[3] See, *e.g.*, *Gooding* v. *Willard*, 209 F. 2d 913 (C.A. 2), holding that the administrative resolution of conflicting medical testimony as to the causative relationship between an employee's accident and his death was controlling upon the courts.

2. The Deputy Commissioner's resolution of the conflicting medical testimony is also dispositive of petitioner's second point—his contention (Pet. 19-22) that his loss of vision was cumulative, and resulted from the nature of his employment. For the medical testimony accepted by the Deputy Commissioner indicated that the vitreous hemorrhage which blinded petitioner was totally unrelated to his employment, but resulted instead from petitioner's "very abnormal" hypertension and resulting arteriosclerosis. See the Statement, *supra*, pp. 3-5. The Deputy Commissioner specifically found (Pet. 12a) that this hemor-

[3] Moreover, as the Statement, *supra*, indicates, the medical testimony in support of petitioner's claims is based upon his own version of the accident—a story which the Deputy Commissioner rejected. In fact, one of the two medical witnesses supporting petitioner's claim expressly testified that if petitioner's injury consisted only of getting grease in his eye (as found by the Deputy Commissioner), he would not have assumed any causal relationship between the accident and the loss of vision (T. 179), *supra*, p. 5.

rhage was neither caused by nor aggravated by the accident of which petitioner complains; and petitioner points to no other incident or aspects of his employment upon which to base his claim of causal relationship. Accordingly, his argument on this score is without merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1958

U. S. GOVERNMENT PRINTING OFFICE 1958 484862 922